

Exhibit 23



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Transcript of Daniel Burke

Date: July 26, 2022

Case: XR Communications, LLC -v- D-Link Systems, Inc., et al.

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WORLDWIDE COURT REPORTING & LITIGATION TECHNOLOGY

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<p>1 statement of unintentional delay was in a 2 position to have firsthand or direct knowledge of 3 the facts and circumstances of the delay at 4 issue, close quote. 5 You did not have firsthand knowledge of 6 all the facts and circumstances of the delay from 7 2008 until the time you filed your petition to 8 revive, correct? 9 A. Mr. Haslam, I want to get this over 10 probably as much as anybody, but that alarm is 11 distracting. It's very distracting. And I -- if 12 it just stopped, I will just ask you give me a 13 minute and then ask the question over again. 14 But with you asking the question, you 15 know, with a preface and that thing going off, I 16 couldn't -- I couldn't do us justice here. 17 MR. HASLAM: Why don't we take a 18 10-minute break and I will see if it goes off? 19 THE VIDEOGRAPHER: Anything before we go 20 off, Mr. Haslam? 21 MR. HASLAM: No. I'm going to pray that 22 this thing goes away. 23 MR. WANG: Let us go off the record, 24 please. 25 THE VIDEOGRAPHER: Certainly. Off the</p>	<p>73</p> <p>1 Q. Yes. And the delay, the intentional 2 delay that has to be explained as unintentional 3 exists from the time the application went 4 abandoned until the application for revival is 5 made, correct? 6 A. No. I don't think your statement is 7 correct, sir. 8 Q. Were you attesting that the delay from 9 June 18th, 2008 until the time you filed your 10 petition, which is Burke Exhibit 4, was 11 unintentional? 12 MR. WANG: Objection to form. 13 A. I don't remember the dates, but the 14 entire time period, yes. 15 BY MR. HASLAM: 16 Q. Okay. And you did not have firsthand or 17 direct knowledge of all the facts and 18 circumstances for that entire period of time, 19 correct? 20 MR. WANG: Objection to form. 21 A. I would have been relying on 22 information. You know, I wasn't a witness to it. 23 It wasn't as if I had dropped the ball and let 24 something go abandoned. So if that is what you 25 mean by firsthand knowledge, I was not an</p>
<p>1 record 1:31. 2 (Thereupon, there was a recess taken at 3 1:31 p.m.) 4 (Thereupon, the proceedings were resumed 5 at 2:03 p.m.) 6 THE VIDEOGRAPHER: On record 2:03. 7 BY MR. HASLAM: 8 Q. I think when we broke, we were looking 9 at I think Burke Exhibit 5, if we can pull that 10 up. This is the notice from the Patent Office 11 accepting your renewed petition to revive. 12 And in the fourth paragraph, it states 13 that, quote: It is not apparent whether the 14 person signing the statement of unintentional 15 delay was in a position to have firsthand or 16 direct knowledge of the facts and circumstances 17 of the delay at issue, period, close quote. 18 Now, you were the person that signed the 19 statement regarding unintentional delay, correct? 20 A. I was the one who signed that statement 21 in connection with the petition for which this 22 decision was granted, right. 23 Q. And were you -- 24 A. I think -- I think they are talking 25 about me, if that's what you are getting at.</p>	<p>74</p> <p>1 eyewitness where I would be relying on my five 2 senses. 3 BY MR. HASLAM: 4 Q. Well, it's not what I said. The Patent 5 Office said it did not -- wasn't apparent that 6 you had firsthand knowledge or direct knowledge 7 of the facts and circumstances of the delay at 8 issue. Did you understand that was referring to 9 you? 10 A. I just said yes. 11 Q. Okay. And it's true that you didn't 12 have firsthand or direct knowledge of the entire 13 time period from 2008 when the application went 14 abandoned until 2010 when you filed your renewed 15 petition, correct? 16 A. I don't -- I don't -- I don't accept 17 that statement, sir. 18 Q. Did you have firsthand knowledge of the 19 events from June 2008 until the time you filed 20 your renewed petition in 2010? 21 A. What do you mean by firsthand knowledge? 22 Q. What did you understand the Patent 23 Office meant when it said you -- it was not 24 apparent that you had firsthand knowledge? 25 MR. WANG: Objection to form.</p>

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<p>77</p> <p>1 Argumentative.</p> <p>2 A. I don't recall. You are asking me what</p> <p>3 I thought back in 2000 -- whenever this was, in</p> <p>4 2010?</p> <p>5 MR. HASLAM: Yes.</p> <p>6 A. I don't know that I even -- I don't know</p> <p>7 that I formed an opinion on it at the time. I</p> <p>8 mean, direct knowledge to me is like you witness</p> <p>9 something or, you know, you could witness</p> <p>10 something firsthand.</p> <p>11 Q. Well, let's focus on that. Did you have</p> <p>12 direct knowledge of the circumstances of the</p> <p>13 delay between -- of this application between June</p> <p>14 of 2008 and the time that you filed your renewed</p> <p>15 petition on November 8th, 2010?</p> <p>16 A. I would be speculating. I definitely</p> <p>17 didn't have it for the entire time period.</p> <p>18 Q. For what time period did you have direct</p> <p>19 knowledge?</p> <p>20 A. When I was involved.</p> <p>21 Q. And to the best of your recollection,</p> <p>22 now having gone through several documents, what</p> <p>23 time period do you think you were involved?</p> <p>24 A. I don't recall. Probably it looks like</p> <p>25 April of 2010.</p>	<p>79</p> <p>1 A. I don't remember now. I don't know if</p> <p>2 ever knew. But sitting here today, I have no</p> <p>3 idea.</p> <p>4 Q. Do you have any understanding as to</p> <p>5 whether a client who does not pay or fails to pay</p> <p>6 his counsel causing an abandonment is a reason</p> <p>7 that meets the unintentional delay requirements</p> <p>8 for reviving a petition?</p> <p>9 MR. BARHAM: Objection to form.</p> <p>10 A. Are you asking me -- are you asking me</p> <p>11 sitting here right now regarding my understanding</p> <p>12 of the law?</p> <p>13 Q. I'm really asking you at the time you</p> <p>14 filed the petition, renewed petition in 2010, did</p> <p>15 you have an understanding on that subject?</p> <p>16 A. I have no recollection of my</p> <p>17 understandings or what I did or what reasonable</p> <p>18 inquiry I did at the time.</p> <p>19 Q. Did you do any legal research as to what</p> <p>20 constituted unintentional delay with respect to</p> <p>21 the reason for the original abandonment?</p> <p>22 A. Can you just -- somebody repeat that</p> <p>23 either have it read back or repeat it.</p> <p>24 Q. I can repeat it. Did you do any legal</p> <p>25 research at the time you prepared your renewed</p>
<p>78</p> <p>1 Q. Okay. So you had direct knowledge --</p> <p>2 A. At least, you know, at least.</p> <p>3 Q. So from April 10th, at least, through</p> <p>4 November 8th, 2010, you had direct knowledge of</p> <p>5 the facts and circumstances of the delay at</p> <p>6 issue, correct?</p> <p>7 A. I don't remember what I knew back then.</p> <p>8 Looking at these documents, it looked like the</p> <p>9 delay was unintentional from the -- you know,</p> <p>10 from the entire time period.</p> <p>11 Q. And on what do you base that?</p> <p>12 MR. BARHAM: Objection to the extent it</p> <p>13 has been asked and answered, but you can respond.</p> <p>14 A. On my practice, my -- my statement, the</p> <p>15 other fellow's statements.</p> <p>16 Q. You relied on Mr. Schwedler's</p> <p>17 statements?</p> <p>18 A. I have no idea what I relied on back</p> <p>19 then. I just said from looking at these</p> <p>20 documents, it looks like the entire time period.</p> <p>21 Q. What was the reason that Mr. Brooks</p> <p>22 withdrew from representing the client, his</p> <p>23 client?</p> <p>24 A. I have no idea.</p> <p>25 MR. WANG: Objection to form.</p>	<p>80</p> <p>1 petition for revival in November of 2010 as to</p> <p>2 what constituted the legal bases for an</p> <p>3 unintentional delay causing abandonment?</p> <p>4 A. I don't have a specific recollection but</p> <p>5 I probably did, because that would be my</p> <p>6 practice. This isn't something like we deal</p> <p>7 with every day. Right? So I probably looked</p> <p>8 into it.</p> <p>9 Q. Did you document in any way any inquiry</p> <p>10 or diligence or investigation that you did about</p> <p>11 the circumstances surrounding the reason for the</p> <p>12 original abandonment and any efforts made to</p> <p>13 revive the patent between June of 2008 and the</p> <p>14 time that you filed your renewed petition on</p> <p>15 November 8th, 2010?</p> <p>16 MR. WANG: Objection to form.</p> <p>17 Confusing, compound.</p> <p>18 A. I don't remember.</p> <p>19 Q. Do you still have any files from the</p> <p>20 time that you represented XR Communication in</p> <p>21 connection with this application?</p> <p>22 A. I don't know.</p> <p>23 Q. What was the reason for the delay</p> <p>24 between May 6th, 2010 when Mr. Schwedler's second</p> <p>25 petition for revival was denied and November 8th,</p>

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1	2010 when you filed your renewed petition?	1	that document that Mr. Sharma sent because he had
2	MR. WANG: Objection to form.	2	all of them together, I think.
3	A. You are asking what -- what -- what	3	MR. HASLAM: Can we go to Burke Exhibit
4	dates are you talking about?	4	2?
5	MR. HASLAM: May 6th, 2010 and November	5	A. Okay. Yeah. This is kind of what I was
6	2010.	6	referring to. So if you look right under where
7	A. I object to the characterization as a	7	it says dismissed in bold print, it says: Any
8	delay, and I don't think it was a delay. I think	8	request for reconsideration of this decision must
9	we responded within the time limits provided by	9	be submitted within two months from the mailed
10	the Patent and Trademark Office.	10	date of this decision. Extensions of time under
11	Q. What time limits are provided by the	11	11 CFR 1.136 A are permitted.
12	Patent and Trademark Office for reviving an	12	So if I recall correctly, we had four
13	abandoned patent application when a prior attempt	13	months. If it's a two-month -- if it's a
14	to revive it is denied?	14	14 two-month response time, usually the extensions
15	A. I believe it said it right on the --	15	15 you get four months. So you get six months from
16	right on the -- if you go back and look at one of	16	16 this, I think. If there's weekends and holidays
17	17 those earlier petitions where it was denied, I	17	17 or something like that, you know that factors in.
18	I think it said it there, but it might have said it	18	I don't know. You have to go back and
19	somewhere else.	19	19 see if I was within that six-month time.
20	I don't -- I don't recall offhand, but	20	Q. You filed it five months and two days
21	21 if we go -- if you want to go back to one of	21	later.
22	22 those exhibits, I think it said it right on	22	A. Okay. I believe, just from
23	23 there.	23	recollection, I believe I was within the time.
24	Q. What the time limit -- what the time is?	24	Q. Assuming it's a four-month extension?
25	A. I think it had something to that effect,	25	A. Yes. That's the way they usually work.
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1	if I recall correctly.	1	If it's a three-month -- they basically give you
2	Q. Let's go back to Burke Exhibit 4. If we	2	six months total and you have to pay for any
3	can go to the first page of this, 32805, the	3	3 extension times. So if it's a three-month
4	first two pages is the petition for revival that	4	4 response period, you can get three more months.
5	you had filed, that you filed.	5	Q. If it's two months, you get four months
6	A. This is the one I filed?	6	is your understanding?
7	Q. This is the one you filed. Can you show	7	A. Right. You just have to pay a little
8	me what you are referring to that gives you what	8	more.
9	is an appropriate time for delay?	9	Q. And what investigation did you do for
10	A. I -- I was referring to the decision.	10	10 the time period between June 2009 and August
11	Let's go back to the most recent decision. I	11	11 2009?
12	think you just said it was in May of 2010.	12	MR. BARHAM: Objection to form. You can
13	Q. The denial?	13	answer.
14	A. The denial, the denial, the denial. I'm	14	A. June 2009, I'm sorry, and when?
15	sorry. Forgive me if I misspoke. This is the	15	BY MR. HASLAM:
16	16 petition. So let's go back to the decision. The	16	Q. August 2009. What was the reason for
17	17 most -- so as I understand it, so there was a	17	17 any delay in that time period in filing a
18	18 petition, there was a decision to deny it.	18	18 petition for revival?
19	There was a second, a renewed petition	19	A. Could I have that question read back to
20	and a decision denying it. Then there was my	20	20 me, please?
21	petition and a decision granting it.	21	Q. What did you do to determine the reasons
22	MR. HASLAM: Yes.	22	22 for any delay in filing a petition for revival of
23	A. I want to go to the middle decision. It	23	23 this application between June of 2009 and August
24	would be the second decision that denied it. It	24	24 of 2009?
25	25 would almost be easier if you had that thing,	25	A. I said many times, I really don't

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 1 recount -- recall what I did, you know, back
 2 then. But you keep using the word delay. You
 3 know, I don't -- I don't know that that was a
 4 factor at all.

5 You know, you look at -- you look at how
 6 long the Patent Office took to make the
 7 decisions. I think one time it was two months,
 8 one time it was six months. That's just normal.
 9 You know, I don't -- I don't even understand --
 10 well, go ahead.

11 Q. So waiting two months when you know that
 12 an application has previously been abandoned to
 13 file a petition for revival is just common
 14 practice in your understanding?

15 MR. WANG: Objection to form.

16 Mischaracterizes testimony.

17 A. I -- there was never a -- when you say
 18 delay, you make it sound like there was an
 19 intentional delay or some type of -- I don't -- I
 20 just -- that's why I'm having trouble with these
 21 questions.

22 I don't think there was any delay. I
 23 don't think there was any motivation for any
 24 delay. And I think the issue here is whether the
 25 abandonment was intentional. I don't -- I think

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 1 you might be confusing it with there are -- there
 2 used to be other grounds for reviving
 3 applications where you had to show that everybody
 4 involved treated this as like their number one
 5 priority and that's like all they worked on.

6 That's not the basis for reviving these
 7 applications. You know, in these petitions, it's
 8 just a different basis. So I'm just -- I'm
 9 sorry. I'm not accepting your preface about
 10 there being delay.

11 I think these were timely. And I think
 12 it should be pretty darn clear to anybody looking
 13 at this record that, you know, you had at least
 14 from the period of all these petitions, that
 15 clearly people didn't want them, you know,
 16 abandoned.

17 But as far as the focus on the time
 18 period before that, I just don't remember what I
 19 did.

20 Q. The statement that you certified in your
 21 petition for revival states: The entire delay in
 22 filing the required reply from the due date for
 23 the required reply until the filing of a
 24 grantable petition under 37 CFR 1 point 137(b)
 25 was unintentional, close quote?

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 1 Aren't they using delay just to refer to
 2 that time period between the time that the
 3 required reply was due and when you file a
 4 petition?

5 A. No. They are talking about the whole
 6 time period. They are talking about the entire
 7 time period. But in your questions, in your
 8 questions, it seems like you are suggesting that
 9 somehow maybe that the attorney has like delayed
 10 this or somebody delayed this intentionally.

11 I think they are just using it to refer
 12 to, you know, the span of time between the
 13 original due date for the response and the
 14 grantable petition, the filing date of the
 15 grantable petition, which I filed on I think,
 16 what did you say, November something.

17 Q. Yes. Well, the statement simply says
 18 you have to account for that period of time,
 19 correct, what was going on?

20 A. No. No. It does not say that. It
 21 doesn't say you have to account. I think before
 22 you used the word you have to explain, and that's
 23 what I'm trying to point out. I'm sorry. I
 24 don't want to be argumentative.

25 But what it's asking you is during that

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 1 time period, the entire time period, was it
 2 unintentional or did somebody intend to, you
 3 know, did somebody intend to allow the
 4 application to go abandoned.

5 Q. Can we pull up Burke Exhibit 5? In
 6 paragraph 4, I asked you about the first sentence
 7 and we have gone over that. In the -- after the
 8 second sentence, which states, quote:
 9 Nevertheless, such statement is being treated as
 10 having been made as a result of a reasonable
 11 inquiry into the facts and circumstances of such
 12 delay, close quote.

13 And then it cites a CFR cite and a final
 14 rule notice in the Federal Register. Do you see
 15 that?

16 A. I see that.

17 Q. Did you review that?

18 MR. WANG: Objection to form.

19 A. Sitting here now, I don't recall if I
 20 reviewed either one of them. I don't know. I
 21 just don't remember.

22 Q. The sentence after that citation to the
 23 Federal Register says, quote: In the event that
 24 such an inquiry has not been made, Petitioner
 25 must make such an inquiry, close quote.

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 1 And I have asked you before, but having
 2 looked at that, did you make an inquiry as to the
 3 entire period of time from March 17 -- from
 4 March -- from the day after the due date of the
 5 March 17th office action 2008 until the time you
 6 filed your petition for revival? [REDACTED]
 7 A. According to my practice and the way
 8 I've always practiced, I did, but I just don't
 9 remember what I did. I don't -- wouldn't file
 10 something like this willy-nilly. I would do what
 11 I was supposed to do.
 12 It's -- you know, I have been involved
 13 in disputes, you know, since before I got out of
 14 law school. And it's obvious that when patents
 15 are in litigation, that things like this are
 16 combed over with a fine tooth comb.
 17 It's no surprise that you got to do
 18 things right up front, correctly up front so that
 19 when somebody goes over it with a fine tooth
 20 comb, there are no issues.
 21 Q. And given that people go over it with a
 22 fine tooth comb, you would have documented the
 23 analysis you did to support the statement that
 24 you made that entire time of delay was
 25 unintentional, correct?

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 1 A. No.
 2 MR. WANG: Objection to form.
 3 A. I don't know what I did. And not
 4 necessarily, no.
 5 Q. You did not talk to anybody about the
 6 reason why the application went abandoned in the
 7 first place, correct?
 8 MR. WANG: Objection to form.
 9 Mischaracterizes testimony. Asked and answered.
 10 A. That's not correct, Mr. Haslam.
 11 Q. Who did you talk to?
 12 A. I told you I don't remember, but you
 13 can't say -- you can't -- I don't remember who I
 14 spoke to or what I did, but I can't sit here and
 15 testify that I didn't speak to anybody.
 16 I mean, it didn't go abandoned on my
 17 watch so to speak.
 18 Q. But your statement covers that time
 19 period when it wasn't on your watch, correct?
 20 A. Yes, sir.
 21 MR. HASLAM: I have no further
 22 questions.
 23 MR. WANG: I have some questions. But
 24 before I continue, Mr. Burke do you need a break
 25 or would you like a short break?

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 1 THE WITNESS: No.
 2 EXAMINATION BY COUNSEL FOR THE PLAINTIFF
 3 BY MR. WANG:
 4 Q. Mr. Burke, now is 2022, correct?
 5 A. 2022.
 6 Q. And the events that Mr. Haslam asked
 7 about today occurred in 2000 --
 8 THE WITNESS: Time out. Can somebody
 9 mute? Somebody is moving papers around. It's
 10 just making it difficult to hear. Can you start
 11 that question again?
 12 MR. WANG: Sure. Sure.
 13 BY MR. WANG:
 14 Q. The events that we have been talking
 15 about in this deposition occurred roughly in the
 16 2009/2010 time frame?
 17 A. Roughly and earlier, yes.
 18 Q. So that's at least 13 years ago,
 19 correct?
 20 A. Ballpark, yes.
 21 Q. And you did not have a specific --
 22 specific recollections of particular
 23 conversations or actions from that time period 13
 24 years ago, correct?
 25 A. That's correct.

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 1 Q. And -- and you wouldn't want to
 2 speculate to testify about any specific actions
 3 or communications if you didn't have a
 4 recollection about them, correct?
 5 A. I think I told Mr. Haslam everything I
 6 remember.
 7 Q. Okay. I want to clarify something. And
 8 I apologize if you already stated this. But many
 9 times in today's deposition, you would respond to
 10 Mr. Haslam's questions with I don't recall or I
 11 don't remember.
 12 Do you recall that?
 13 A. Yeah. That was my response to a lot of
 14 Mr. Haslam's questions.
 15 Q. Right. Just to be absolutely clear,
 16 when you gave that response, you were not
 17 testifying that something did or did not occur,
 18 correct?
 19 A. That's correct.
 20 Q. It was just that you didn't have a
 21 specific recollection of that event or whether or
 22 not it occurred sitting here today?
 23 A. I think a lot of it, I didn't have any
 24 general recollection. So yeah, I didn't have a
 25 specific recollection or even a general

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<p>93</p> <p>1 recollection.</p> <p>2 Q. Okay. Mr. Burke, I want to ask about 3 your background, because you -- you touched upon 4 that. And so when did you receive your law 5 degree?</p> <p>6 A. 1985.</p> <p>7 Q. And you mentioned that you had done some 8 work at the PTO. Can you describe that or the 9 time, the time frames for that?</p> <p>10 A. Just to sum it up, after college, after 11 I was done my engineering degree, I got an 12 engineering degree at Cooper Union, I went to 13 work at the Patent Office.</p> <p>14 I worked as a patent examiner. I was 15 trained at the Patent Office. I left the Patent 16 Office after about 13 months. I went to the 17 University of Virginia full time. During the 18 summers, I worked at patent firms.</p> <p>19 I think I referred to something I was 20 working on in '84 while I was a summer associate 21 at Kenyon & Kenyon. I would have kept working on 22 it but my wife went in to labor with our first 23 kid. School had started, but I was into it and 24 kept working on it.</p> <p>25 But from '85 -- from now, I mean,</p>	<p>95</p> <p>1 enough to get a waiver. So I became a patent 2 agent, and I took that exam while I was in law 3 school. So there was a period of time where I 4 was a patent agent and not yet a patent attorney.</p> <p>5 Q. Okay. So how -- how many years have you 6 worked at the PTO or inside the PTO?</p> <p>7 A. I worked there a little over a year. 8 Basically, a summer to a summer.</p> <p>9 Q. Okay. What -- sorry. Go ahead.</p> <p>10 A. I think it was 13 months if I recall it.</p> <p>11 Q. When did you become a patent attorney 12 registered to practice before the PTO?</p> <p>13 A. As soon as I -- well, I don't -- I don't 14 recall when I got the paperwork in. But 15 basically as soon as I became an attorney and I 16 was sworn in, I believe, the spring of '86, 17 then it was just a matter of form to be 18 recognized as a patent attorney instead of a 19 patent agent. I might have had to file a paper 20 with the Patent Office to show them I was an 21 attorney now.</p> <p>22 Q. I see. And after you became an 23 attorney, you got a PTO registration number, 24 correct?</p> <p>25 A. No. No. I think I had the registration</p>
<p>94</p> <p>1 initially, I worked at firms. Then there came a 2 time when I started my own firm. My own firm and 3 had a partner for a while. We went our separate 4 ways a while back.</p> <p>5 And so I have worked with patents, 6 trademarks and copyrights my entire career.</p> <p>7 Q. Okay. So you have nearly 40 years of 8 experience at patents, trademarks and copy 9 rights?</p> <p>10 A. Getting close to that, yeah.</p> <p>11 Q. And all of those things relate to the 12 Patent and Trademark office, right, the PTO?</p> <p>13 A. No. Actually, my -- one of my biggest 14 litigations was copyright, copyright infringement 15 action. So I do all fair amount of copyright 16 licensing now.</p> <p>17 Q. I just wanted to clarify. So you worked 18 as an examiner and as a patent agent at the PTO. 19 Is that correct?</p> <p>20 A. No. No. So the way it worked at the 21 Patent Office, if you -- I believe if you worked 22 at the Patent Office -- well, at the Patent 23 Office, I was a patent examiner.</p> <p>24 After I left, I had to take the agent's 25 exam. I hadn't worked at the Patent Office long</p>	<p>96</p> <p>1 number as a patent agent.</p> <p>2 Q. Okay. And have you continued to 3 practice as an attorney before the PTO up until 4 today?</p> <p>5 A. Yes.</p> <p>6 Q. So -- so you practiced before the PTO 7 for 30-plus years?</p> <p>8 A. It's getting close to 40.</p> <p>9 Q. Getting close to 40. Okay. Have you 10 ever been subject to discipline by the Patent and 11 Trademark Office?</p> <p>12 A. No.</p> <p>13 Q. Have you ever been found to have 14 committed inequitable conduct before the Patent 15 Office?</p> <p>16 A. No.</p> <p>17 Q. So I know that you may not have a 18 specific recollection about some of the specific 19 documents that Mr. Haslam showed you from 13-plus 20 years ago, but I want to talk about your general 21 policies or practices.</p> <p>22 Is that okay?</p> <p>23 A. You don't need my permission to ask 24 questions. Go ahead.</p> <p>25 Q. I want to talk about you are well aware</p>

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<p>97 1 of a patent attorney's obligations in submitting 2 or signing documents submitted to the PTO, 3 correct?</p> <p>4 A. I believe so.</p> <p>5 Q. And you are familiar with the duty of 6 candor owed to the Patent Office?</p> <p>7 A. Yes. Yes.</p> <p>8 Q. And is it your usual practice to follow 9 that duty of candor and -- and adhere to it?</p> <p>10 A. Yes, carefully.</p> <p>11 Q. And is it also your practice to make a 12 reasonable investigation into the facts if called 13 for by a certification or a submission?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. One of the things that came up 16 today is you referred to a couple of decisions by 17 the PTO denying a petition for revival submitted 18 by Mr. Schwedler.</p> <p>19 Do you recall that?</p> <p>20 A. I remember talking about that.</p> <p>21 Q. And you were talking about a first 22 decision and a middle decision. Do you recall 23 that?</p> <p>24 A. Yes.</p> <p>25 Q. Are you aware of or do you now know the</p>	<p>99 1 and then the Patent Office's grant of that. 2 Do you recall that?</p> <p>3 A. You were breaking up a little bit. Can you repeat that?</p> <p>5 Q. So yeah, I will repeat the question. Do 6 you recall looking at various documents today 7 that were introduced as exhibits, including 8 your -- the revival petition that you submitted 9 and then the Patent Office's decision granting 10 it?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. In the documents you've seen 13 today, have you seen any false statements in the 14 different exhibits that we've looked at?</p> <p>15 MR. HASLAM: Objection. Calls for speculation. Lacks foundation.</p> <p>17 A. Not that I recall in anything I've seen today, no.</p> <p>19 BY MR. WANG:</p> <p>20 Q. Do you recall seeing any knowingly false statements made?</p> <p>22 MR. HASLAM: Objection. Lacks foundation. Calls for speculation.</p> <p>24 A. No.</p> <p>25 BY MR. WANG:</p> <p>100 1 Q. Have you seen any evidence of inequitable conduct?</p> <p>3 MR. HASLAM: Objection. Lacks foundation. Calls for speculation.</p> <p>5 A. No.</p> <p>6 BY MR. WANG:</p> <p>7 Q. Have you seen any evidence of a specific intent to deceive the Patent and Trademark Office?</p> <p>10 MR. HASLAM: Objection. Lacks foundation. Calls for speculation.</p> <p>12 A. No.</p> <p>13 Q. Turning to another topic, you got into a 14 discussion with Mr. Haslam about like the word 15 delay and the word intentional, and I want to 16 explore that a little bit.</p> <p>17 Have you seen any evidence that the 18 applications that you revived or were revived 19 were intentionally abandoned or, in other words, 20 abandoned deliberately and on purpose?</p> <p>21 A. Today we really -- I know there was -- there was some document relating to some other application. But basically we are dealing with one application today, right?</p> <p>25 MR. WANG: Correct.</p>
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1 A. So you were asking -- I think your 2 question, you might have misspoke, but I think 3 you said applications. So that kind of threw me. 4 Can you give me the question again?		1 A. I think it was before the July 4th 2 weekend. I believe he sent me an e-mail one day. 3 I didn't respond. And I think he called me the 4 following day late, it was late our time. You 5 know, it could have been 5:30, 6 p.m. our time 6 here on the East Coast.	
5 Q. Sure. Let -- let me ask that. So we 6 will focus on the application for which you 7 submitted a petition for revival that was granted 8 by the PTO.		7 That could have been -- it could have 8 been the Thursday before. My best recollection 9 is around the Thursday before the July 4th 10 weekend. I didn't really speak to him then and 11 he contacted me the following week.	
9 A. Okay.		12 So the following week, I had other 13 communications with him.	
10 Q. So have you seen any evidence today or 11 ever that that application was ever affirmatively 12 intentionally abandoned?		14 Q. And when Mr. Sharma first reached out to 15 you, he did so by e-mail, correct?	
13 A. No.		16 A. That's correct.	
14 Q. Have you seen any evidence today or 15 before that that application was deliberately 16 abandoned on purpose?		17 Q. And I believe you testified that he sent 18 you some documents or a compilation of papers and 19 asked for a call to discuss them, correct?	
17 A. No.		20 A. Yeah. And it wasn't -- it wasn't in his 21 first -- it wasn't in his first e-mail. So it 22 was in a subsequent e-mail. It might have 23 been -- I think we agreed to speak after -- 24 shortly after the July 4th weekend, so maybe July 25 5th.	
18 Q. In the Patent Office's granting of 19 revival for petition, you don't interpret that as 20 requiring that that the patent prosecutor or you 21 needed to have firsthand knowledge of the entire 22 period of delay, correct?	102		104
23 MR. HASLAM: Objection. Lacks 24 foundation. Calls for speculation.		1 I think before -- it might have been 2 before that conversation that he sent a pdf that, 3 if I recall correctly, had the three petitions 4 and three decisions. Yeah. He sent those.	
25 A. It seems to say that right on its face,		5 Q. And in those communications with 6 Mr. Sharma by phone and those e-mails, did he 7 ever ask you if you were represented by counsel?	
1 that if you didn't -- if you weren't -- I guess I 2 will interpret it, if you weren't a witness to 3 it, then you did sufficient inquiry or reasonable 4 inquiry.		8 A. No. I kind of -- I kind of stopped him 9 in his tracks. You know, I have been involved in 10 these disputes before, and I mean, my primary 11 concern was attorney-client privilege.	
5 Q. Did you perform a reasonable inquiry as 6 set forth in that paragraph?		12 And I explained to him, I don't know 13 that he didn't know this, but I made clear that 14 the attorney-client privilege belongs to the 15 client. So I thought it was best practice to do 16 this formally, rather than informally.	
7 A. I believe I did, because that was my 8 practice, but I don't remember what I did.		17 He wanted to speak -- he wanted to speak 18 to me he said for 20 to 30 minutes, something 19 like that. I sort of put a stop to it up front 20 and said no, I think we need to do this formally.	
9 Q. Okay. Mr. Burke, I want to -- you've 10 testified today about communications with 11 Mr. Sharma, who's a colleague of Mr. Haslam, and 12 phone conversations with him, correct?		21 Attorney-client privilege is one reason. 22 The second reason is that, you know, that there 23 would be a record of what was said and what was 24 not said.	
13 A. Yeah. I referred to them, yes.		25 Q. So Mr. Sharma wanted to speak to you,	
14 Q. And Mr. Sharma was an attorney for Aruba 15 who first reached out to you in this case, 16 correct?			
17 A. That's correct.			
18 Q. And I believe you testified you've had 19 about five phone conversations with him?			
20 A. I don't think -- I don't think -- I 21 don't think it was that many. I think it was 22 more on the order of probably three, two or 23 three, probably two or three.			
24 Q. When roughly were those phone 25 conversations? Do you recall?			

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Transcript of Daniel Burke

27 (105 to 108)

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<p>105</p> <p>1 quote, informally for 20 or 30 minutes. Is that 2 correct?</p> <p>3 A. Yes.</p> <p>4 Q. And up to that point, he had never asked 5 you if you were represented by counsel, correct?</p> <p>6 A. I believe that's correct, yes.</p> <p>7 Q. And he also did not encourage you to 8 seek counsel, correct?</p> <p>9 A. That's correct.</p> <p>10 Q. Mr. Burke, in those early conversations 11 or in conversations with Mr. Sharma, did he ever 12 inform you that his client Aruba was alleging 13 that you, Mr. Burke, committed inequitable 14 conduct before the Patent and Trademark Office?</p> <p>15 A. No.</p> <p>16 Q. Apart from saying that he represented 17 Aruba, did he give you any -- any indication of 18 his role or what he was seeking to prove and why 19 he wanted to speak to you?</p> <p>20 A. I'm sorry. There was just a -- there 21 was a noise in this room. Just give me that one 22 again, please.</p> <p>23 Q. Sure. In your discussions with 24 Mr. Sharma, apart from indicating that he 25 represented Aruba, did he give you any impression</p>	<p>107</p> <p>1 correct?</p> <p>2 A. That's correct.</p> <p>3 Q. Okay. Without --</p> <p>4 A. Up to a certain point, you know. You 5 know, like I said, I have been doing this for a 6 very long time. Right? And there was a time 7 when it seemed like every defendant raised 8 inequitable conduct. I think the Federal Circuit 9 even said this is getting out of hand.</p> <p>10 Everybody's raising inequitable conduct.</p> <p>11 So when he said he represented a 12 defendant and when he sent me those petitions and 13 the decisions, it probably occurred to me that 14 that's what -- that's where he was going.</p> <p>15 So in your question when you asked if 16 there was an indication, yeah, I would say that 17 was -- it was at least a hint that that's what he 18 was doing. I'm taking -- I'm using my 19 experience.</p> <p>20 Q. Right. But nothing that he 21 affirmatively said?</p> <p>22 A. No. He never said -- he never said we 23 are accusing you of this, that or the other 24 thing.</p> <p>25 Q. All right. Mr. Burke, is it fair that</p>
<p>106</p> <p>1 about the claims that they were making or seeking 2 to develop?</p> <p>3 A. Well, the attachment to his e-mail was a 4 pretty good clue as to what he wanted to talk 5 about. And he might have said early on that his 6 client had been sued by XR Communications. 7 So knowing that he was a defendant and 8 then sending those declarations to revive -- 9 excuse me -- knowing that he represented a 10 defendant and then sending those declarations to 11 revive, it's -- it was -- seemed apparent to me 12 what he wanted to, you know, that he was working 13 on a defense.</p> <p>14 MR. WANG: Okay.</p> <p>15 A. And those documents, that was the focus, 16 that was the focus of his defense.</p> <p>17 Q. Sure. He never clarified it in the 18 sense that he -- he was just acting like he was 19 seeking information and wanted to talk about 20 these documents. Is that fair?</p> <p>21 A. Ask it again.</p> <p>22 Q. Okay. So let me ask it a different way. 23 You already said that he gave you no indication 24 that his firm and Aruba were seeking to or 25 accusing you of committing inequitable conduct,</p>	<p>108</p> <p>1 subsequently, before this deposition, you formed 2 a clearer understanding of the accusations 3 that -- that were being made against you and 4 inequitable conduct?</p> <p>5 A. Yes.</p> <p>6 Q. And was that when you -- you made -- and 7 the reason why you made the decision to obtain 8 your own counsel?</p> <p>9 A. Yes. Actually, it was.</p> <p>10 MR. WANG: Okay. I have no further 11 questions. I pass the witness.</p> <p>12 MR. HASLAM: Does anyone else have 13 questions? I have a few.</p> <p>14 FURTHER EXAMINATION BY COUNSEL FOR THE DEFENDANT</p> <p>15 ARUBA</p> <p>16 BY MR. HASLAM:</p> <p>17 Q. I just want to go over the sequence of 18 your conversations with Mr. Sharma. You got an 19 e-mail from Mr. Sharma which indicated he 20 represented X -- Aruba which was a defendant in 21 litigation brought by XR and he wanted to talk to 22 you about prosecution, correct?</p> <p>23 A. I recall -- the only part of that that I 24 can't affirm is that he wanted to talk to me 25 about prosecution. So his e-mail definitely</p>

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	113		115
1	Q. Okay. Have you ever had to withdraw	1	(Off the record at 3:05 p.m.)
2	from representing a client in connection with	2	
3	prosecution for nonpayment of bills?	3	
4	MR. BARHAM: Objection.	4	
5	MR. WANG: Objection to form.	5	
6	MR. BARHAM: Only answer that if you can	6	
7	do so without divulging attorney-client	7	
8	confidences from other cases.	8	
9	A. I'm thinking. I don't remember any. So	9	
10	I don't know. I mean, I might have. I just	10	
11	I don't remember.	11	
12	MR. HASLAM: Okay. Thank you for your	12	
13	time. I have no further questions.	13	
14	THE WITNESS: Okay. I wish you all good	14	
15	luck.	15	
16	MR. WANG: Nothing further from me.	16	
17	Thank you, Mr. Burke.	17	
18	MR. HASLAM: Thank you.	18	
19	THE VIDEOGRAPHER: Anything else before	19	
20	we close, Attorney Haslam?	20	
21	MR. HASLAM: No.	21	
22	THE VIDEOGRAPHER: Time is 3:02 and this	22	
23	concludes today's deposition of Daniel Burke. We	23	
24	are off the record.	24	
25	(Thereupon, there was a discussion off	25	
	114		116
1	the record.)	1	CERTIFICATE OF SHORTHAND REPORTER
2	MR. LEE: We also have a standing but we	2	NOTARY PUBLIC
3	would also like to order rush on this.	3	
4	THE REPORTER: When would you like the	4	I, Dianna C. Kilgalen, the officer
5	final, Mr. Lee?	5	before whom the foregoing deposition was
6	MR. LEE: What are the options?	6	taken, do hereby certify that the foregoing
7	THE REPORTER: There are many options.	7	transcript is a true and correct record of
8	You can have daily copy up to five days. There	8	the testimony given; that said testimony was
9	are many options. I can have the office let you	9	taken by me stenographically and thereafter
10	know what the cost is. Do you have an idea when	10	reduced to typewriting under my direction;
11	you would want it?	11	that reading and signing was not requested;
12	MR. LEE: I think before the end of the	12	and that I am neither counsel for, related
13	week.	13	to, nor employed by any of the parties to
14	THE REPORTER: Okay. By Friday?	14	this case and have no interest, financial or
15	MR. LEE: And I think the standing order	15	otherwise, in its outcome.
16	calls for a rough. We will get that today?	16	IN WITNESS WHEREOF, I have hereunto
17	THE REPORTER: Yes.	17	set my hand and affixed my notarial seal this
18	(Thereupon, there was a discussion off	18	27th day of July, 2022.
19	the record.)	19	My commission expires June 28th, 2025.
20	THE REPORTER: Mr. Saleem, did you want	20	
21	a copy?	21	
22	MR. SALEEM: Yes, regular transcript is	22	<i>Dianna C. Kilgalen</i>
23	fine.	23	NOTARY PUBLIC
24	MR. WANG: Dianna, if I could get a	24	IN AND FOR THE STATE OF MARYLAND
25	rough as well. Thank you.	25	COUNTY OF HARFORD

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